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Upholding the law on international commercial surrogacy: at whose cost?

Claire Achmad and Machteld Vonk¹

In dit artikel kijken de auteurs naar tegen de achtergrond van een recente internationale draagmoederschapszaak in Cambodja naar een aantal vragen rondom de handhaving van een verbod op draagmoederschap en de gevolgen die dit voor de betrokken partijen kan hebben vanuit kinder- en mensenrechtelijk perspectief.

1. Introduction

International commercial surrogacy raises many difficult legal and ethical questions, as has been shown the past decades in the numerous articles, books and judgments published worldwide, and the international efforts being undertaken to seek some agreement about the practice of international commercial surrogacy and its consequences.² There are many interests and rights involved in international commercial surrogacy, including women's rights and children's rights and the rights of a state to draft legislation and to uphold the law. Since international commercial surrogacy is, by its nature, an international phenomenon, different jurisdictions with different views on (commercial) surrogacy maybe involved. This may result first of all in different views on the validity of international (commercial) surrogacy agreements and second on the consequences for the parties involved if they act in contravention of the law. Meanwhile commissioning parents – often from countries in which commercial surrogacy is unregulated or banned – make use of surrogacy in countries where this is either allowed or jurisdictions where international surrogacy is not (yet) regulated or banned.³ These later jurisdictions in particular often have to deal with a sudden influx of commercial surrogacy cases as the commercial surrogacy market moves from state to state. Surrogacy services agencies have proven to be very agile in meeting the demands for cross-border surrogacy services, moving from one jurisdiction to another as soon as problems and barriers to their operations arise, as governments start talking about or move to impose a ban on international commercial surrogacy within their jurisdiction. We have, for example, seen the surrogacy industry move in recent years from India to

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² For instance J. Scherpe, C. Fenton-Glynn and T. Kaan, *Eastern and Western Perspectives on Surrogacy*, Intersentia: Antwerp, 2019; Achmad, C.I., *Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective*, E.M. Meijers Instituut, 2018; Wells-Greco, M., *The status of children arising from inter-country surrogacy arrangements: the past, the present, the future*, Eleven International Publishing, 2015; Gerber, P. and O'Byrne, K. (eds.), *Surrogacy, Law and Human Rights*, Routledge, 2015. See also The cross-border recognition of parent-child relationship statuses (parentage), including international surrogacy arrangements, an update on the work of the Hague Conference on Private International Law (HCCH) in *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht - nr 144 - Protecting the Rights of Families and Children in a Changing World - KNVIR Preadviezen*, October 2017.

³ It is difficult to find up-to-date information on the status of (commercial) surrogacy in all jurisdictions worldwide because this is an area of legislation that is under discussion in many jurisdictions. Most reliable, yet no longer always up-to-date is the information contained on the Hague Conference on Private International Law website (<https://www.hcch.net/>); in particular see the 'Parentage/Surrogacy Project' page and information contained therein: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last accessed 20 July 2019) See also J. Scherpe, C. Fenton-Glynn and T. Kaan, *Eastern and Western Perspectives on Surrogacy*, Intersentia: Antwerp, 2019.

Nepal and then to Thailand and Cambodia and to Laos.⁴ Almost out of the blue these jurisdictions are faced with complex questions such as the parentage of children born from surrogate mothers, whether or not this form of international commercial surrogacy amounts to child trafficking and whether, when deciding to combat the influx of international commercial surrogacy cases, the interest of public policy should override the interests of specific children and parents (be it surrogate or commissioning).

A recent case that caught attention concerns international commercial surrogacy in Cambodia, involving Cambodian surrogate mothers and commissioning parents who are Chinese nationals living in China.⁵ Cambodia recently banned surrogacy (very suddenly) because of the sudden growth of the industry within its jurisdiction in an unregulated manner; however, it is still working on the development of a comprehensive new law to address the practice of surrogacy – including international commercial surrogacy – in Cambodia.⁶ Meanwhile, agencies are targeted for closure and surrogacy brokers can be prosecuted and jailed for up to six months.⁷ More recently, however, surrogate mothers have also been targeted under the ban and Cambodian crimes legislation. In June 2018 a group of 33 pregnant surrogate mothers was arrested,⁸ in November 2018, another group of surrogate mothers was arrested,⁹ and even more recently, three Cambodian surrogate mothers were arrested in Vietnam.¹⁰ These women spent a substantial amount of time in custody (some up to or more than six months) and were eventually released on bail on the condition that they would keep the children and raise them until they turn 18 years old. This despite many of the Chinese commissioning parents wanting to take the children into their care as they had intended, and the lack of genetic relationship between the surrogate mothers and the children they have given birth to. Now released from detention on this strict condition, the surrogate mothers will be monitored to ensure that this condition is not breached; if they attempt to provide the children to the commissioning parents, they will be prosecuted for human trafficking under Cambodian human trafficking and criminal law, and face prison sentence of up to 20-years.¹¹ What this case highlights, in particular, is

⁴ Patricia Fronek, 'Current perspectives on the ethics of selling international surrogacy support services', *Medicolegal and Bioethics*, 8, 2018, p.12, available at: <https://www.dovepress.com/current-perspectives-on-the-ethics-of-selling-international-surrogacy-peer-reviewed-fulltext-article-MB> (last accessed 27 July 2019). See for further discussion: Carolin Schurr, 'The baby business booms: Economic geographies of assisted reproduction', *Geography Compass*, 12:8, August 2018, available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/gec3.12395> (last accessed 27 July 2019).

⁵ The decision in the case itself was not published, given that Cambodian Courts and authorities do not publish decisions of this kind (other than at Supreme Court level). Therefore, the main source of information providing details about the case are the numerous newspaper articles that have been published. E.g., Erin Handley and Kong Meta, 'I will not give them the baby': the plight of Cambodia's detained surrogates', *The Guardian*, 2 October 2018. <https://www.theguardian.com/global-development/2018/oct/02/i-will-not-give-them-the-baby-plight-cambodia-detained-surrogates> (last accessed 25 July 2019).

⁶ Matt Blomberg, Cambodia urged not to criminalize surrogate mothers with new law, Reuters, 17 May 2019. <https://www.reuters.com/article/us-cambodia-women-lawmaking/cambodia-urged-not-to-criminalize-surrogate-mothers-with-new-law-idUSKCN1SN16S> (last accessed 25 July 2019).

⁷ Phan Soumy, Australian Founder of surrogacy firm arrested after ban, 21 November 2016, Cambodia Daily. <https://www.cambodiadaily.com/editors-choice/australian-founder-surrogacy-firm-arrested-ban-120786/>

⁸ Handley and Meta, 'I will not give them the baby': the plight of Cambodia's detained surrogates', *The Guardian*, 2 October 2018. <https://www.theguardian.com/global-development/2018/oct/02/i-will-not-give-them-the-baby-plight-cambodia-detained-surrogates> (last accessed 25 July 2019).

⁹ Melanie Krause, 'Cambodia arrests 11 more surrogates, as Australian nurse released', *BioNews*, 19 November 2018, available at: https://www.bionews.org.uk/page_139872 (last accessed 27 July 2019).

¹⁰ The New York Times, Cambodian women face surrogacy charges after Vietnam birth, 19 July 2019. <https://www.nytimes.com/aponline/2019/07/19/world/asia/ap-as-cambodia-surrogacy.html> (last accessed 20 July 2019). See also: Long Kimmarita and Kim Sarom, 'Surrogate mothers' questioned in court', *The Phnom Penh Post*, 17 July 2019, available at: <https://www.phnompenhpost.com/national/surrogate-mothers-questioned-court> (last accessed 27 July 2019).

¹¹ Elaine Chong and Tim Whewell, 'Paid to carry a stranger's baby – and then forced to raise it', *BBC News*, 2019, available at: <https://www.bbc.co.uk/news/resources/1dt-sh-surrogates> (last accessed 27 July 2019); and Erin Handley and Kong

that it is clear that jurisdictions that see a sudden increase in international commercial surrogacy are struggling to regulate this influx of commercial surrogacy, and that this is exacerbated by the lack of specific domestic and international law and regulation in relation to the practice of international commercial surrogacy. As a result – and as this case demonstrates – states may end up taking emergency measures that are not in the interests of the surrogate mothers, the children or the commissioning parents involved in international commercial surrogacy.

Against the backdrop of these Cambodian cases, we want to discuss a number of core issues that emerge at the intersection of family law and international human rights law, namely the question of parenthood and some particular issues arising in relation to the protection of children's rights. We do not pretend to discuss all issues that may be relevant in the context of surrogacy, but aim to contribute to the ongoing conversation on this topic.

2. *Who is a parent?*

One of the core questions in surrogacy, and in this case as well, is 'what makes a parent?'. Genetics, giving birth, intention or a combination of these factors? Do the same factors apply for (commissioning) mother and fathers? These are questions that have been on the minds of scientists and practitioners for the past decades, but there is (as yet) no clear, undisputed answer to that question, and it seems unlikely that there ever will be. The practice of surrogacy complicates matters further, because where giving birth is generally a workable starting point when assigning parenthood, this not the case in surrogacy arrangements, where the birth mother did not conceive the child she carries for herself but for others. This complicates our understanding of motherhood in particular, as there may be two and sometimes three mothers, who may make a claim to motherhood: the birth mother, the intended mother and (in case one is used) the egg donor (genetic mother).¹²

Many jurisdictions have been struggling with the question of whether or not to recognise the intended mother, who did not give birth to the child, as the child's parent over the surrogate mother, who did give birth to the child (but who in international commercial surrogacy arrangements does not usually share a genetic link with the child). Some jurisdictions have created regulations for transferring parenthood from the birth mother to the intended parents, before or after birth, but most jurisdictions still adhere to the *adagium* that the birth mother is the child's mother in the eyes of the law.¹³ This creates problems in particular where the jurisdiction of the child's birth recognises the intended mother as the child's mother, but the jurisdiction where the intended mother resides, does not.¹⁴ The Hague Conference on Private International Law is exploring the possibility of drafting a convention on the cross-border recognition of parentage that may also apply to international surrogacy, see the report of Prof. Rutten on this topic in this Special. However, such a convention will likely only apply to the recognition of parentage established in one jurisdiction by another jurisdiction, and not to the primary establishment of parentage itself.

Meta, 'Cambodian surrogates face an impossible choice – forced motherhood, or years in prison', *ABC News Australia*, 12 May 2019, available at: <https://www.abc.net.au/news/2019-05-12/cambodian-surrogates-forced-to-be-mothers-or-face-prison-time/11086640> (last accessed 27 July 2019).

¹² See on this topic for instance Claire Achmad, 'Multiple "Mothers," Many Requirements for Protection: Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy' in Yasmine Ergas, Jane Jenson and Sonya Michaels (eds.) *Reassembling motherhood: Procreation and Care in a Globalised World*, Columbia University Press 2017.

¹³ HCCH, A study of legal parentage and the issues arising from international surrogacy arrangements, March 2014. <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf> (last accessed 27 July 2019).

¹⁴ HCCH, A study of legal parentage and the issues arising from international surrogacy arrangements, March 2014. <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf> (last accessed 27 July 2019).

The surrogacy cases in Cambodia were dealt with under criminal law since they contravened the 2016 Cambodian ban on (commercial) surrogacy, and Cambodian law in relation to the crime of human trafficking.¹⁵ This means that the question of the parentage of these children born out of the commercial surrogacy arrangements was not dealt with as a question in itself. Instead, as would happen in most jurisdictions, the birth mothers were considered to be the legal mothers of the children. In brief the decision regarding the question of ‘who is a parent to a child born of international commercial surrogacy?’ was made in the shadow of criminal law and the rights of the children and the rights and interests of the surrogate mothers and commissioning parents were not part of the equation.

As noted above, no consensus exists in relation to what makes someone a parent in gestational surrogacy situations, and in the context of Articles 3, 7 and 8 of the United Nations Convention on the Rights of the Child among others, there are arguments to be found for both the surrogate mother and the genetic intended parents.¹⁶ Matters are further complicated when the surrogate mother is the child’s genetic mother, or when egg and sperm donors are used. In common law jurisdictions judges having to decide on such question may have some leeway. In the US for instance courts have addressed the question ‘who is a parent’, and have found room in the law to assign parenthood to commissioning parents, whether or not they were the genetic parents.¹⁷ But most civil law jurisdictions leave the court no room to judge on the issue of parentage where the domestic law on parentage or the status of children in relation to parents is clear.

It must be acknowledged that in some circumstances, commissioning parents enter into surrogacy arrangements for potentially sinister purposes. However, in the situation where commissioning parents’ intentions are motivated by a genuine desire to form a family and parent with the best interests of the child as their primary aim, what is most unsatisfactory in cases such as the 2018 Cambodian case is that the child does not end up where it is most wanted, based on the original intent of the surrogacy arrangement. It is impossible to say where these children would be better off, but decisions that affect the children’s life and lifetime outcomes, and those of their birth and commissioning parents, should, at least, weigh their interests and their right to family life against the interests of state to uphold a ban on surrogacy.¹⁸ This is undoubtedly a very complicated task for the jurisdictions involved, but there is no other conclusion to be reached from General Comment no. 14 of the Committee on the Rights of the Child: “Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.”¹⁹

In the third part of this article we will discuss some of the children’s rights issues at stake that need to be considered in the context of international commercial surrogacy against the background of the Cambodian cases.

¹⁶ HCCH, A study of legal parentage and the issues arising from international surrogacy arrangements, March 2014. <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf> (last accessed 27 July 2019).

¹⁷ Finkelstein et al., *Surrogacy law and policy in the US: A national conversation informed by global law making*, Report of Columbia Law School Sexuality and Gender Clinic, May 2016. https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf (last accessed 27 July 2019).

¹⁹ UN Committee on the Rights of the Child, *General Comment no. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration*, p. 4..

3. *Assessing the core issues through a children's rights lens*

The practice of international commercial surrogacy raises myriad children's rights challenges under the United Nations Convention on the Rights of the Child (CRC).²⁰ Additional to the issues raised through a family law lens discussed above, when applying a children's rights lens to two core issues we have identified as arising from the Cambodian case – namely being born through an illegal agreement and forced parenthood – a number of child rights implications merit consideration.

a) Children's rights implications of being conceived and born pursuant to illegal agreement

It is arguable that because of the commercial nature of many international commercial surrogacy agreements, such agreements are, should they come before domestic courts for adjudication, at risk of being deemed to be illegal under domestic and/or international law. Certainly, this was the view taken by the court that made the decision in the Cambodian case in May 2018.

Doubtless, the illegal nature of such international commercial surrogacy agreements has an impact on the rights of children who are conceived pursuant to, and born as a result of, these agreements. In particular, the child's rights to:

- not to be sold;
- not be trafficked; and
- have their best interests treated as a primary consideration.

i. Sale of children

The international surrogacy agreements involved in the Cambodian case were arguably illegal on several grounds. However, it is less clear whether or not the children born as a result of the agreements are victims of the sale of children under international children's rights law standards and norms.

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Optional Protocol 2)²¹ guarantees children²² protection from sale. Consistent with Article 35 of the CRC,²³ Article 1 of Optional Protocol 2 is furthermore explicit that "[S]tates Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol."²⁴

²⁰ For comprehensive analysis and discussion of the rights of children under the UN Convention on the Rights of the Child in international commercial surrogacy, see: Achmad, C.I., *Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective*, E.M. Meijers Instituut, 2018. Full text available at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/63088/FullText.pdf?sequence=1> (last accessed 20 July 2019).

²¹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000; entered into force on 18 January 2002.

²² Persons under the age of 18, as per Article 1, UN Convention on the Rights of the Child. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3.

²³ Article 35, UN Convention on the Rights of the Child. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3.

²⁴ Article 1, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The sale of children has a broad definition as established under Article 2(a), Optional Protocol 2, comprising three key elements: an act or transaction that transfers a child from one person/group of persons to another; the transfer and receiving of a child by two separate parties; and remuneration or other consideration being exchanged between the parties in relation to the transfer of the child.²⁵ To constitute sale, it is not necessary to show that the sale of the child occurred for a particular purpose.²⁶

The United Nations Committee on the Rights of the Child has stated its concern that the practice of surrogacy can lead to the sale of children.²⁷ The United Nations Special Rapporteur has also reported an overarching conclusion that in applying the Article 2(a) definition of Optional Protocol 2, commercial surrogacy amounts to the sale of children as currently widely practised.²⁸ The Special Rapporteur states that “the transfer of the child is of the essence of the commercial surrogacy arrangement and therefore is a part of the consideration for the payment to the surrogate mother.”²⁹

In the Cambodian case discussed, while there appears to have been financial payment made to the surrogate mothers (or some of the surrogate mothers), given that they were arrested by Cambodian authorities part way through their pregnancies, the surrogacy arrangements were disrupted. Consequently, the children – who had been intended to Chinese commissioning parents – did not end up being transferred to another person or group of persons.

Therefore, while this case appeared *prima facie* to be a case of the sale of children, when applying the Optional Protocol 2 definition of the sale of children, technically the children born through the surrogacy arrangements were never ‘sold’, given that the transfer of a child or children for remuneration or other compensation from one person to another/a group of persons – the essence of the agreement – never occurred.³⁰ While there certainly appears to have existed an intention to transfer the children, without actual transfer having occurred, this element of the definition of the sale of children remains un-satisfied. Consequently, it becomes necessary to consider whether under international children’s rights law, the children who have been born as a result of the surrogacy arrangements in the Cambodian case have been the victims of human (child) trafficking.

²⁵ Article 2(a), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

²⁶ During the drafting of Optional Protocol 2, this was a point of contention between States holding differing views as to whether the definition of sale of children should be restricted to relate to sale for the purpose of sexual exploitation, or left open ended as reflected in the text of Article 2(a) as adopted. See: UN Economic and Social Council, Commission on Human Rights, Rights of the Child, *Question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as basic measures needed for their eradication: Report of the Working Group on its third session*, E/CN.4/1997/97, United Nations, New York, 2 April 1997, at [19]. Full text available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/115/97/PDF/G9711597.pdf?OpenElement> (last accessed 20 July 2019).

²⁷ E.g., United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of India*, CRC/C/IND/CO/3-4, 7 July 2014, At [57](d). Full text available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en (last accessed 20 July 2019).

²⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, Maud de Boer-Buquicchio, 15 January 2018, A/HRC/37/60, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement> (last accessed 27 July 2019).

²⁹ United Nations Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, Maud de Boer-Buquicchio, 15 January 2018, A/HRC/37/60, at [75].

³⁰ However, there have been other cases of international commercial surrogacy around the world which have arguably amounted to the sale of children given that the three elements of the definition of sale of children under Article 2(a) of the Optional Protocol have been satisfied.

ii. Child trafficking

As previously discussed, the 33 surrogate mothers arrested in the Cambodian case were charged with human trafficking under Cambodia's Law on Suppression of Human Trafficking and Sexual Exploitation 2008.³¹ This law gives effect to the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the 'Palermo Protocol'),³² to which Cambodia is a States Party.³³ Under Article 3(a) of the Palermo Protocol, trafficking in persons means:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;³⁴

With regard to children, Article 3(c) of the Palermo Protocol further specifies that "[T]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article."³⁵ Article 3(d) explicitly states that a 'child' is a person under 18 years of age.³⁶

Regardless of the operation of Cambodian domestic law, this definition, therefore, raises the question as to whether under international human rights law, the surrogate mothers in the Cambodian case can be said to have trafficked the unborn children they carried. As noted above, the definition of 'child' under the Palermo Protocol is consistent with Article 1 of the CRC. However, because of the wording of preambular paragraph nine of the CRC and the divergent views among states concerning whether pre-birth protection of rights should be included in the CRC,³⁷ the Convention text is left open to interpretation regarding pre-birth matters. It therefore remains a possibility to argue that an unborn child who is in-utero can be the victim of human trafficking under the Palermo Protocol. As Pascoe J notes (extra-judicially):

[T]here is a direct causal relationship between the pre-birth stage and a newly born child's rights because events that affect the child when it is not yet born can directly obstruct the

³¹ Law on Suppression of Human Trafficking and Sexual Exploitation 2008 (Cambodia). Full text available at: https://www.unodc.org/res/cld/document/khm/2008/law_on_suppression_of_human_trafficking_and_sexual_exploitation_html/Cambodia_03_-_Law-on-Suppression-of-Human-Trafficking-and-Sexual-Exploitation-15022008-Eng.pdf (last accessed 20 July 2019).

³² Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

³³ Cambodia signed the Protocol on 11 November 2001, and ratified 02 July 2007.

³⁴ Article 3(a), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

³⁵ Article 3(c), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

³⁶ Article 3(d), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

³⁷ Preambular paragraph nine reads: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", "

child's access to its universal rights at birth. Intervention is necessary at the time the child is still in utero because by the time the child is born it maybe [sic] too late for protection of the child's rights.³⁸

An unusual aspect of the Cambodian case is that it in addition to Cambodian surrogacy brokers, the surrogate mothers were arrested on human trafficking charges. However, applying the Palermo Protocol definition of human trafficking and based on the facts of the case publicly available, it is the surrogate mothers themselves who have been the victims of this international human rights violation. The surrogate mothers were recruited, transported to Phnom Penh, and held in confinement; this arguably occurred on the basis of deception (some of the 33 surrogate mothers involved have said they were not told commercial surrogacy was illegal), the abuse of power or of a position of vulnerability (the surrogate mothers were socio-economically vulnerable), and the giving of payments to achieve the consent of a person having control over another person. Furthermore, it is arguable that the surrogate mothers were exploited on the basis that they would carry a child or children to term and provide these to another person following birth.

For the purposes of this analysis then, it is necessary to set aside the fact that the surrogate mothers were charged under Cambodian law with human trafficking, which appears to have been undertaken to uphold public interests and send a strong cautionary message. Taking a human rights-based approach leads us to assign the surrogate mothers the status of victims of human trafficking. However, can the unborn children they carried in-utero be said to have been trafficked, too?

On a plain reading of the Palermo Protocol, it appears that the unborn child in-utero within a woman who is trafficked when pregnant is only protected by virtue of being a part of that individual woman's body. However, applying a dynamic interpretation of the Palermo Protocol in light of preambular paragraph nine of the CRC, this brings into focus the fact that the unborn child in-utero within a trafficked woman will, once born, be a child with human rights under the CRC (like all other children). As a result, it is necessary to acknowledge that for the children who have been born through the Cambodian case, the fact of having been born to a trafficked woman – and thereby arguably exploited – will very likely have some implications on each individual child's rights. In particular, there may be significant implications for the child's rights to life, survival and development,³⁹ the child's best interests,⁴⁰ and to not be the victim of the sale of children and exploitation.⁴¹

In the context of international commercial surrogacy more broadly then, CRC States Parties should take all steps to prevent the human trafficking of women for the purposes of surrogacy. In doing so, they should consider the protection of children who are conceived and who may be born through surrogacy, in all contexts, including through the trafficking of surrogate mothers.

The above analysis of the rights of the child in international commercial surrogacy using the Cambodian case as a point of departure – with regard to both the sale of children and the human trafficking of children – serves to highlight the legislative vacuum at both the domestic and international levels concerning surrogacy. Any legislative efforts to fill this vacuum should ideally address issues of the sale of children and the human trafficking of children in the context of international commercial surrogacy, to provide adequate protection of the rights of children conceived and born in this context.

³⁸ Pascoe J, 'Trafficking in Unborn Children', International Conference on Child Labour and Child Exploitation, 04 August 2008, p.3, available at: <http://classic.austlii.edu.au/au/journals/FedJSchol/2008/22.pdf> (last accessed 27 July 2019).

³⁹ Article 6, CRC.

⁴⁰ Article 3, CRC.

⁴¹ Article 35, CRC.

iii. Principle of the best interests of the child

In the Cambodian case and in other similar cases of international commercial surrogacy where children have been born within the context of illegality, many of the child's rights under the CRC are compromised from before birth and once the child is born.⁴² From a children's rights perspective, it is important that the child's best interests are treated with primacy in international commercial surrogacy cases. This is doubly imperative given the child is or may be born into a context of illegality, alongside the fact that all children in infancy are in a position of particular vulnerability given their age and stage in life. At this stage of life, a child is without personal agency, has no ability to make their views heard and cannot advocate for their own rights and best interests.

Children are not born into international commercial surrogacy circumstances and a context of illegality through actions of their own doing. They should not be discriminated, punished or treated in any way based on the circumstances of their birth that leads to them experiencing a detrimental impact on their individual best interests and rights under the CRC. There is a need for judicial and executive decision-makers taking actions and decisions in relation to such children to ensure that their decision-making and actions are guided at all times by what is in the best interests of the child, in light of the child's own individual circumstances.

The significant overarching relevance of the best interests of the child principle was emphasised by the Grand Chamber of the European Court of Human Rights in its judgment in *Paradiso Campanelli v. Italy*, when dealing with a situation concerning a child who was also born through an illegal international commercial surrogacy arrangement without a genetic link with the commissioning parents.⁴³ The Grand Chamber in that case decided that the decision and associated action taken by the Italian authorities to remove the child from the care of its commissioning parents was in the public interest (said by the Grand Chamber to weigh heavily in the balance), given that they had procured the child through a surrogacy arrangement which was illegal under Italian law.⁴⁴ Although the Grand Chamber did not provide a specific analysis of the child's best interests, it stated that the child's separation from his commissioning parents "would not cause the child grave or irreparable harm".⁴⁵

Furthermore, in its recent *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, the Grand Chamber confirmed the principle arising from Article 3 of the CRC that "whenever the situation of a child is in issue, the best interests of that child are paramount", and that this applies in international surrogacy matters.⁴⁶

Arguably, however, the Grand Chamber in *Paradiso* did not attach enough weight to the findings of the Italian Court-appointed social workers who had assessed the relationship which had been established between the child and his commissioning parents, in whose care he had been for eight months.⁴⁷ The social workers' assessment showed that an attachment had formed between the child

⁴² For further discussion of the interplay between pre-birth actions and post-birth rights from a children's rights perspective, see Chapter 6 in Achmad, C.I., *Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective*, E.M. Meijers Instituut, 2018. Full text available at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/63088/FullText.pdf?sequence=1> (last accessed 20 July 2019).

⁴³ *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017, at [208].

⁴⁴ *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017, at [215].

⁴⁵ *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017, at [210].

⁴⁶ *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Requested by the French Court of Cassation (Request no. P16-2018-001), Grand Chamber, European Court of Human Rights, 10 April 2019, at [38].

⁴⁷ *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017, at [106].

and his commissioning parents, the social workers reporting the child to be “in excellent health and his well-being was self-evident, since he was being cared for by the applicants to the highest standards”.⁴⁸ This point was emphasised by the dissenting opinion in the case.⁴⁹

The Cambodian case and the *Paradiso* case illustrate that in international commercial surrogacy cases adjudicated as having occurred in the context of illegality, the principle of the best interests of the child is not always being applied with comprehensive assessment informed by the specifics of the child’s individual circumstances. This highlights the essential need for decision-makers in such cases to ensure that their decisions and actions are informed by and incorporate a comprehensive and holistic assessment of what is in the best interests of individual children, based on their specific circumstances, to effectively uphold their best interests and rights.

b) Implications of forced parenthood on children’s rights

Consideration of the second core issue raised by the Cambodian case – that of forced parenthood as imposed by the Cambodian Court – also raises issues of profound importance when analysed through a children’s rights lens. This is because by giving the surrogate mothers an impossible choice between prison or raising the child, a number of the child’s rights under the CRC are impacted. These include the child’s economic, social and cultural rights, but arguably it is the child’s rights to know and be cared for by their parents and to preserve identity that are most affected.

i. Right to know and be cared for by parents as far as possible and right to preserve identity

Article 7(1) of the CRC establishes that children have the right from birth to as far as possible, know and be cared for by their parents.⁵⁰ International commercial surrogacy is a practice that did not exist when the CRC was adopted. However, interpreting the CRC in light of present-day circumstances means that as a starting point, arguably the ‘parents’ of a child should be viewed in a wide sense, taking into account the various parents who can potentially be related to a child in the context of 21st century family formations, including genetic parents, social parents and legal parents. Such aspects of parenthood may manifest in one person; however, in the context of international commercial surrogacy, it is likely that there will be multiple potential ‘parents’ related to an individual child.

This view of the different aspects that can make up a child’s parent or parents is also acknowledged to some extent by the Committee on the Rights of the Child, which has emphasised that the child has a right to know their genetic origins, albeit in the context of donor conception, not international commercial surrogacy.⁵¹ Acknowledging the need to balance the interests of other potential parents and ultimately be guided by what is in the child’s rights and best interests, given that the child’s genetic origin is intrinsically connected to genetic parentage, arguably this means that the child should at the very least be able to know their genetic parent(s), in order to preserve their identity as protected under Article 8(1) CRC.

This aspect of the child’s Article 7(1) and Article 8(1) rights is jeopardised when a decision is made to force parenthood upon one particular adult party in any surrogacy arrangement, rather than taking a

⁴⁸ *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017, at [25].

⁴⁹ *Paradiso and Campanelli v. Italy*, Application no. 25358/12 (Grand Chamber), Joint Dissenting Opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev, 24 January 2017 at [12].

⁵⁰ Article 7(1), Convention on the Rights of the Child.

⁵¹ E.g., e.g. UN Committee on the Rights of the Child, Concluding observations regarding Denmark, 15 February 1995, UN Doc. CRC/C/15/Add.33, at [11]; and UN Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, 09 October 2002, CRC/C/15/Add.188, at [31].

wider, multi-parent view in relation to the child. Forcing parenthood upon one party will likely (as occurred in the Cambodian case) go against the interests, intentions and wishes of other potential parents involved. While it is not necessarily the case that the child's rights and best interests are aligned with any one potential parent/set of parents being recognised as the child's legal parents or taking on the role of the child's social parents (that is, with day-to-day care of the child and responsibility for raising the child), it is in the child's best interests to be able to preserve all aspects of their identity, consistent with their Article 8(1) CRC right.

In the context of international commercial surrogacy and viewing the child holistically, the child's Article 8(1) right needs to be considered as multidimensional in nature, with genetic, biological and social identity elements at stake. As such, the child's Article 7(1) and Article 8(1) CRC rights intersect and are interdependent. In instances where decisions are made in such cases to force parenthood, to protect and uphold children's rights under the CRC, decision-makers ought to have considered the implications of such a decision on the child's identity preservation right, given that the parentage decision may mean that the child is not even able to know another 'parent' who may have intended to parent the child. Indeed, such a 'parent' will likely form an integral aspect of the child's identity. Of course, it will be of paramount importance to ensure that decisions are made that will ensure the safety and welfare of the child, consistent with the child's best interests. However, in applying the best interests of the child principle in international surrogacy cases, the child's rights to relationships with parents and to identity preservation are also of utmost importance. As the judges in joint dissent stated in *Paradiso*,

[I]n identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment.⁵²

In the Cambodian case, it is unclear whether adequate attention was given to the implications for the child's Article 7 and 8 rights of the decision to force parenthood onto the surrogate mothers. Due to the forced parenthood decision, the child's ability to enjoy their right to know (and be cared for by) one group of parents – their genetic commissioning parents – has been displaced. This may well have lifelong implications for the child's rights.

4. Conclusion

International commercial surrogacy as a method of family formation raises profound questions relating to the nature of familial relationships, parentage, women's rights and the protection of children's rights. As the Cambodian case discussed in this article illustrates, in the absence of international agreement or regulation of the practice, and with the operation of domestic law that may not be fit-for-purpose to govern international commercial surrogacy situations, perverse outcomes affecting the rights and interests of all parties involved in these arrangements can eventuate. The Cambodian case provides another example of domestic decision-makers taking actions and decisions in the context of international commercial surrogacy that seek to send a strong cautionary message to discourage the practice and is grounded in the public interest. However, upholding the criminal law in this case has led to a situation whereby children are now separated from their genetic parents, surrogate mothers are forced to raise the children as their own, and commissioning parents are blocked from seeking parental status in relation to the children they intended to raise. In upholding the law in this way, it has come at the cost, to some extent, of the

⁵² *Paradiso and Campanelli v. Italy*, Application no. 25358/12 (Grand Chamber), Joint Dissenting Opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev, 24 January 2017 at [6].

rights and best interests of the children born, as well as of the various potential parents involved – including the surrogate mothers – too. This reality emphasises the ongoing need for international agreement on the practice of international commercial surrogacy, and for a child-centred, human rights informed approach to be taken by decision-makers at the domestic level in the meantime, when considering fundamental issues such as parentage and the care arrangements of children born this way.